of the bag holders, and if at the time they were to have been delivered, the defendant refused to accept and pay for them the plaintiff then could recover under provision of the Code." This is not in accord with weight of authority. It is well settled that a vendor upon a breach of contract before performance due, may treat it as a present breach and bring action immediately. *Hochster* v. *De La Tour,* 2 El. & Bl. 678; *Frost* v. *Knight,* L. R. 7 Ex. 111; *Johnstone* v. *Milling,* 16 Q. B. Div. 460. In the United States the Supreme Court adopted the same rule in *Roehm* v. *Horst,* 178 U. S. 1. See also *Kadish* v. *Young,* 108 Ill. 170, 48 Am. Rep. 548; *Crabtree* v. *Messersmith,* 19 Iowa 182. MECHEM, SALES, § 1089: Contra,—*Daniels* v. *Newton,* 114 Mass. 530, (but see *Collins* v. *Delaporte,* 115 Mass. 159); *Riley* v. *Hale,* 158 Mass. 240; ANSON, CONTRACTS, *285 and note. See also *Barker & Stewart Lumber Co.* v. *Ed. Hines Lumber Co.,* 137 Fed. 300, 308. The vendor may elect to keep the contract open, and await the time the contract is to be performed and then hold buyer responsible. *Kadish* v. *Young* (supra), and authorities cited therein; *Stokes* v. *Mackay,* 147 N. Y. 223. See also, *Ault* v. *Dustin,* 100 Tenn. 366; *Johnstone* v. *Milling,* L. R. 16 Q. B. Div. 460. The same rule applies to sale of goods to be manufactured, *Cort* v. *Ambergate Railway Co.,* 17 Q. B. 127; *Butler* v. *Butler,* 77 N. Y. 472; *Collins* v. *Delaporte,* 115 Mass. 159. The contract is not rescinded, but broken and while the other party has the right to deem it in force, for purpose of recovery of damages, he has not the right to unnecessarily enhance the damages by proceeding, after the countermand, to finish the undertaking. MECHEM, SALES, § 1092; *Clark* v. *Marsiglia,* 1 Denio (N. Y.) 317; approved and followed in *Hosmer* v. *Wilson,* 7 Mich. 294; *Derby* v. *Johnson,* 21 Vt. 21. The same rule also laid down in *Danforth* v. *Walker,* 37 Vt. 239; *Dillon* v. *Anderson,* 43 N. Y. 231; *Unexcelled Fireworks Co.* v. *Polites,* 130 Pa. St. 536; see *Barker & Stewart L. Co.* v. *Edw. Hines L. Co.* (1905), 137 Fed. 300, 309. Such absolute refusal is to be considered in the same light, as respects the plaintiff's remedy, as an absolute physical prevention by defendants. ANSON, CONTRACTS, *285; *Derby* v. *Johnson,* 21 Vt. 21; *Haines* v. *Tucker,* 50 N. H. 311; *Smith* v. *Lewis,* 24 Conn. 624; *Clement* v. *Messerole,* 107 Mass. 362; *Collins* v. *Delaporte,* supra; *Clark* v. *Marsiglia,* supra; *Cort* v. *Ambergate Ry. Co.,* supra.

SALES—REMEDY OF SELLER—NOTICE OF INTENTION TO RESELL.—A vendee refused to take and pay for goods bought by him. One of the remedies given to a vendor by the Code is "He may sell the property, acting for this purpose as agent for the vendee, and recover the difference between the contract price and price of resale." *Held,* that before the vendee will be liable for such difference it must appear that he was notified of vendor's intention to sell at vendee's risk. *Felty* v. *Southern Flour and Grain Co.* (Ga. 1913), 78 S. E. 1074.

The cases on this point are in hopeless conflict. It is held in Illinois and elsewhere, that no such notice is necessary. MECHEM, SALES, § 1633. *Ulman* v. *Kent,* 60 Ill. 271; *Maulding* v. *Steele,* 105 Ill. 644; *Wrigley* v. *Cornelius,* 162 Ill. 92; *Clore* v. *Robinson,* 100 Ky. 402; *Kellog* v. *Frolich,* 139 Mich. 612;

Ingram v. *Mathieu,* 3 Mo. 209; *Van Brocklen* v. *Smeallie,* 140 N. Y. 70. See 3 BENJAMIN, SALES, 1023. On the other hand, in Indiana and other states, it is declared that such notice is indispensable, "a material element in the cause of action and must be stated in the complaint." *Dill* v. *Mumford,* 19 Ind. App. 609 and cases cited. (See also in accord: *Davis Sulphur Ore Co.* v. *Atlanta Guano Co.,* 109 Ga. 607, upon which the principal case was decided); *Bowsner* v. *Cessna,* 62 Pa. St. 148; *Granberry* v. *Frierson,* 2 Baxt. (Tenn.) 326; *Leonard* v. *Portier,* 15 S. W. 414 (Tex.); *American Hide Co.* v. *Chalkley,* 101 Va. 548; *Pratt* v. *Freeman Mfg. Co.,* 115 Wis. 648; *Hayes* v. *Nashville,* 80 Fed. 641, 26 C. C. A. 59. Mr. MECHEM, in his work on SALES, (§ 1624), states the rule as follows: "unless the goods are perishable, or other special circumstances would render notice impracticable or unavailing, notice of the seller's intention to resell must be given, if the seller intends to make the price realized upon the sale the basis of his recovery against the buyer." See *Penn* v. *Smith,* 98 Ala. 560; *Holland* v. *Rea,* 48 Mich. 218; *Green* v. *Ansley,* 92 Ga. 647; *Davis Sulphur Ore Co.* v. *Atlanta Guano Co.* (supra). Notice may be waived by the buyer, and such waiver will be presumed where the buyer tells the seller he may do what he pleases with the goods. *Wrigley* v. *Cornelius,* 162 Ill. 92. Notice of time and place of sale (as distinguished from intention to sell) need not be given. *Magnes* v. *Sioux City Nursery Co.,* 14 Colo. App. 219; *Van Brocklen* v. *Smeallie,* supra; *Leonard* v. *Portier* (Tex.), 15 S. W. 414; *Pratt* v. *Freeman Mfg. Co.,* 115 Wis. 648.

TORTS—MASTER'S LIABILITY FOR ASSAULT AS AFFECTED BY PROVOCATION OF SERVANT.—Plaintiff, a passenger on defendant street railway, engaged in an altercation with the motorman in which the latter used much profanity and vile language. Plaintiff sued for an assault and battery. Defendant introduced evidence to show that the plaintiff provoked the assault. Plaintiff proved no actual assault and battery, and the court *held* that the evidence as to provocation was sufficient to justify the jury in acquitting the defendant. *Binder* v. *Georgia Railway and Electric Co.* (Ga. 1913), 79 S. E. 216.

As a general rule the mere fact that a servant has been provoked into an assault will not excuse the master from liability, especially if the master be a carrier. *Baltimore & Ohio R. Co.* v. *Barger,* 80 Md. 23; *Central R. Co.* v. *Brown,* 113 Ga. 414; *Birmingham R. & Electric Co.* v. *Baird,* 130 Ala. 350, 54 L. R. A. 752; *Chicago and E. R. Co.* v. *Flexman,* 103 Ill. 546; *Birmingham R. and Power Co.* v. *Mullen,* 138 Ala. 614. The cases are collected and carefully examined in *Mason* v. *Nashville, Chattanooga and St. Louis Ry.,* 135 Ga. 741, 33 L. R. A. N. S. 280, and the rule there announced is that words may or may not amount to a justification according to the nature and extent of the assault, all of which will be determined by the jury. The cases holding that provocation by the plaintiff will furnish justification as a matter of law are not numerous, and as a rule are decided on the ground of contributory negligence on the part of the plaintiff. *Wise* v. *Covington & C. Ry. Co.,* 17 Ky. Law Rep. 1359; *Peavy* v. *Georgia Ry. & Bkg. Co.,* 81 Ga. 485, 12 Am. St. Rep. 334.